

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications	)	
in the 800 MHz Band	)	WT Docket No. 02-55
	)	
Consolidating the 900 MHz Industrial/Land	)	
Transportation and Business Pool Channels	)	

To: The Commission

**SUPPLEMENTAL REPLY COMMENTS OF SOUTHERN LINC**

By:

Christine M. Gill  
John R. Delmore  
McDermott, Will & Emery  
600 13<sup>th</sup> Street, N.W.  
Washington, D.C. 20005  
202-756-8000

Michael D. Rosenthal  
Director of Regulatory Affairs  
Southern LINC  
5555 Glenridge Connector, Suite 500  
Atlanta, Georgia 30342  
678-443-1500

Attorneys for Southern LINC

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## **EXECUTIVE SUMMARY**

The many comments filed in response to the "Supplemental Comments of the Consensus Parties" indicate that wireless licensees of all types continue to vigorously oppose or have serious reservations about the so-called Consensus Plan. The comments drive home the inescapable conclusion that the Consensus Plan is an unlawful, ineffective, overly costly, and overly burdensome vehicle for resolving public safety interference in the 800 MHz band. The Commission must not adopt it. Rather, as Southern has urged from the outset of this proceeding, the Commission must adopt a more rational approach to resolving public safety interference.

Opposition to the Consensus Plan is widespread. As in past comment rounds, public safety entities express significant concerns with the plan, starkly illustrating that APCO's decision to endorse it does not represent universal approval by the public safety community. Closely related to public safety entities, critical infrastructure entities continue to strongly oppose the plan; Southern is not aware of a single utility that supports it. Opposition from B/ILT entities is also ongoing. CMRS and SMR carriers, likewise, are not remotely impressed with the Supplemental Filing.

One of the primary problems with the Consensus Plan is that the complicated, costly, and burdensome rebanding it contemplates would not substantially mitigate 800 MHz public safety interference. As Southern observed in a previous comment round, the PWC Commenters have failed to discuss whether rebanding would mitigate fifth order intermodulation interference, and there is no evidence that rebanding would reduce *any* type of intermodulation interference to the many public safety licensees (and Business and Industrial/Land Transportation licensees) that would be located above 809/854 MHz. CMRS commenters note that rebanding would not reduce receiver overload and emphasize that day-to-day interference mitigation techniques

would still be required even after rebanding. Public safety licensees also express concern that they would continue to be vulnerable to interference under the Consensus Plan.

A major concern raised by nearly all commenters is the potential for only partial rebanding and increased interference due to the uncertainty of the Consensus Plan's funding. The overarching question is whether the Commission has authority to order Nextel to fund the Consensus Plan and whether it has authority to enforce the funding commitment if relocations are begun. Southern and other commenters assert that it does not. Also, public safety commenters express serious apprehension that funding for their relocations would not be assured. Critical infrastructure and other Business and Industrial/Land Transportation ("B/ILT") commenters also question whether Nextel's funding commitment will be sufficient. To that end, numerous entities argue that Nextel's pledge should not be capped.

Commenters are also greatly troubled by the proposed Relocation Coordination Commission ("RCC"). Their concerns start with whether the Commission is authorized to delegate the extraordinary amount of authority that the RCC would have under the Consensus Plan. Numerous commenters assert that such an extensive delegation of authority is impermissible. A related issue raised by commenters is the lack of oversight that the Commission would have over the RCC. Commenters also observed that the potential for damage from a lack of oversight would be exacerbated by the lack of appellate recourse to decisions of the RCC.

Parties of all types are alarmed by the Consensus Plan's requirement that incumbent licensees provide massive amounts of system information to Nextel and the RCC. Public safety and critical infrastructure commenters state that this requirement could pose a threat to national security, as terrorist groups would find such information highly valuable. Several parties also

highlight the potential for entities connected with the RCC to use the information to advance commercial interests.

Commenters also stress their ongoing concerns with Nextel's request for 10 MHz of contiguous, nationwide 1.9 GHz spectrum. The strongest opposition to this aspect of the Consensus Plan comes from CMRS licensees, whose opposition Nextel unbelievably labels as motivated by an anticompetitive animus. Nextel's *ad hominem* attack, however, disregards the many, many pages of rational and reasoned legal and policy arguments against its spectrum request that have been submitted in this proceeding. Nextel is simply attempting to divert attention from the fact that it is leveraging its own interference problems into an anticompetitive strategy of disrupting other SMR and B/ILT licensees while securing a multi-billion dollar spectrum windfall for itself. Although other carriers would certainly benefit from having access to the 1.9 GHz spectrum, they have argued that any additional commercial spectrum should be allocated through an open, competitive auction. Notably, non-CMRS parties also oppose Nextel's request.

An additional concern is that adoption of the Consensus Plan would diminish the value of spectrum held by non-Nextel licensees in the 700 and 800 MHz bands and reduce competition for commercial services. Specifically, the Consensus Plan contemplates Nextel vacating the 700 MHz Guard Band and reassigning its spectrum for public safety use. That would require changes in the regulatory and licensing framework of the 700 MHz Guard Band, which at least one commenter contends would substantially reduce the value of the spectrum it purchased at auction. Similarly, the Consensus Plan contemplates a new regulatory structure for the 800 MHz band, such that the spectrum below 816/861 MHz would essentially become the non-CMRS band. Although licensees purchased spectrum below 816/861 MHz at auction for millions of dollars with the expectation that it would remain amenable to commercial use, the proposed

restructuring would involve the promulgation of rules that would severely constrain commercial use for licensees in this portion of the band (Nextel would not be affected, as the Consensus Plan contemplates it moving to spectrum entirely above 816/861 MHz). Thus, nearly all 800 MHz licensees currently below 816/861 MHz except Nextel would experience a significant devaluation of their spectrum assets and competition would be seriously harmed.

Finally, several commenters take issue with the new technology restrictions and similar technical rules contained in Appendix F to the Supplemental Filing (such as out-of-band emissions limits for licensees in the 861-895 MHz band). For its part, Southern believes that it is premature for the Commission to consider such restrictions and rules. Because sound engineering solutions must, at a minimum, take into account the structure of the band (*e.g.*, whether channels are interleaved), the Commission should not attempt to design such solutions until it has determined whether it will realign the 800 MHz band, and if so, the exact form that realignment would take. Instead, the Commission should first issue a report and order adopting immediate interference mitigation measures such as those recommended by Southern in its initial Comments. Once the Commission reaches a decision regarding the structure of the 800 MHz band, it should appoint an independent technical advisory committee to review whether new technical rules are advisable.

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**SUPPLEMENTAL REPLY COMMENTS OF SOUTHERN LINC**

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission, Southern Communications Services, Inc., d/b/a Southern LINC ("Southern") respectfully submits these Supplemental Reply Comments in response to the initial comments filed in response to the "Supplemental Comments of the Consensus Parties."<sup>1</sup>

**I. INTRODUCTION**

The many comments filed in response to the "Supplemental Comments of the Consensus Parties" ("the Supplemental Filing") cover a wide range of issues and raise many questions about the need for, the legality of, and the viability of the so-called Consensus Plan.<sup>2</sup> The Consensus

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<sup>1</sup> Wireless Telecommunications Bureau Seeks Comment On "Supplemental Comments of the Consensus Parties" Filed In The 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Supplemental Comments of the Consensus Parties* (filed Dec. 24, 2002). Unless otherwise indicated, all comments, reply comments, and other filings referenced herein were filed in WT Docket No. 02-55.

<sup>2</sup> The so-called Consensus Plan was filed in the August 7, 2002 Reply Comments of Nextel Communications, the Industrial Telecommunications Association, the Association of Public-Safety Communications Officials-International, and fourteen other parties ("the PWC Commenters"). It was supplemented by the "Supplemental Comments of the Consensus Parties" filed on December 24, 2002.

Plan's signatories ("the PWC Commenters") have failed to answer many of the basic questions about the complex solution they propose to alleviate public safety interference in the 800 MHz band. Many parties, including public safety entities, have taken a hard look at the plan and continue to have serious concerns about it, including whether it will significantly mitigate interference. Most troubling to nearly all commenters is the Consensus Plan's financial foundation -- Nextel's pledge to contribute \$850 million for relocating incumbent licensees. As many parties point out, this commitment could never be enforced by the Commission and, in any event, is likely to be insufficient because it does not take into account all the expenses associated with the massive realignment contemplated in the Consensus Plan. Commenters also expressed grave concerns about the plan's chief operating mechanism -- the Relocation Coordination Committee. Parties argued that it constitutes an unlawful delegation of Commission authority, that it is lacking in basic principles of fairness, and that it would infringe upon numerous basic licensee rights. Other parties reiterated that the plan's ultimate goal -- resolution of public safety interference -- would not be achieved despite the tremendous expense, disruption, and burden that it would cause licensees.

In short, the PWC Commenters' Supplemental Filing did little to assuage licensees' many concerns with the Consensus Plan. In fact, it largely had the effect of causing even greater concern. Many commenters found that the PWC Commenters' "more complete" discussion of the plan's funding mechanism contained scarcely more detail than the sparse description in the PWC Commenters' original filing. Similarly, this discussion did little to strengthen the funding mechanism's perilously tenuous and problematic nature. Commenters were likewise deeply troubled by the newly unveiled Relocation Coordination Committee, a body so ill-designed that it managed to alarm nearly every type of party that filed comments. The Consensus Plan



remains so far off the mark that even public safety entities, the very licensees it is designed to benefit, expressed serious concern about its viability.

The list of problems with the Consensus Plan raised by commenters in this most recent round is extensive. There was striking unanimity in several key points:

- The Consensus Plan is not an 800 MHz licensee "consensus plan" because it is heavily opposed by wireless licensees of all types.
- The Consensus Plan would not substantially mitigate public safety interference.
- The Consensus Plan's funding is far too uncertain to allow for approval of the plan.
- The proposed Relocation Coordination Committee is unlawful and otherwise replete with problems.
- Nextel's request for 10 MHz of 1.9 GHz spectrum is an unjustified spectrum grab.

## **II. THE CONSENSUS PLAN IS OPPOSED BY NEARLY EVERY TYPE OF WIRELESS LICENSEE**

Based on the fact that the Consensus Plan is endorsed by Nextel, the largest licensee in the 800 MHz band, and several associations whose members hold licenses for various types of spectrum, the PWC Commenters misleadingly tout their plan as being supported by most licensees in the 800 MHz band. The comments filed in the proceeding tell the true story, which is that the plan is widely opposed by all types of wireless licensees. As it turns out, some of the organizations that signed the Consensus Plan have little vested interest in the actual outcome of this proceeding. Forest Industries Telecommunications is a particularly good example: it admits that "only a handful" of its members have 800 MHz licenses.<sup>3</sup> Also, according to a review conducted by American Electric Power Company ("AEP"), the Association of American

Railroads (another Consensus Plan signatory) evidently counts only approximately five 800 MHz licenses among its Full Members.<sup>4</sup> The Commission should seriously question the reason these entities are supporting the plan.

Other associations that signed the Consensus Plan have a significant portion of members that are strongly opposed to the plan. The Industrial Telecommunications Association ("ITA"), for example, is one of the primary forces behind the plan. It counts among its membership AEP and apparently other utilities, which as a group make up a very large block of 800 MHz licensees.<sup>5</sup> AEP, however, is opposed to the Consensus Plan, as is every other utility that filed comments in this proceeding.<sup>6</sup> AEP emphasizes in its comments that although ITA counts AEP as a member, it has not once sought AEP's opinion on the issues in this proceeding.<sup>7</sup> The American Mobile Telecommunications Association ("AMTA") is also a signatory the plan, yet Southern is its second largest member and does not support the plan. Other relatively large members of AMTA filed comments in opposition to the plan, including Mobile Relay Associates and Preferred Communication Systems.<sup>8</sup> In fact, a majority of AMTA board members that hold 800 MHz licenses oppose the Consensus Plan.

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<sup>3</sup> Statement of Forest Industries Telecommunications on its web site (under link entitled "FIT Statement Nextel Plan") at <http://www.landmobile.com/index2.html>.

<sup>4</sup> Comments of American Electric Power Company at 3-4 (Feb. 10, 2003).

<sup>5</sup> See ITA's web site at <http://www.ita-relay.com/about/chairmansmessage.htm>.

<sup>6</sup> Comments of American Electric Power Company at 2 (Feb. 10, 2003); *see, e.g.*, Comments of the United Telecom Council and the Edison Electric Institute on the Supplemental Comments at 1-2 (Feb. 10, 2003), Comments of Ameren at 15-16 (Feb. 10, 2003), Comments of Alliant Energy at 1 (Feb. 10, 2003).

<sup>7</sup> Comments of American Electric Power Company at 2-3 (Feb. 10, 2003).

<sup>8</sup> Comments of Mobile Relay Associates on Supplemental Comments of the "Consensus Parties" at 1 (Feb. 10, 2003); Comments of Preferred Communication Systems on Supplemental Comments of the Consensus Parties at 1 (Feb. 10, 2003).

As demonstrated by this most recent round of comments, numerous licensees, as opposed to national trade associations, expressly oppose or have serious concerns with the Consensus Plan. This widespread opposition illustrates that the "Consensus Plan" is a consensus only of its drafters; not a consensus of licensees in the 800 MHz band or elsewhere.

**Public Safety Licensees.** Many of the public safety entities that submitted comments in response to the Supplemental Filing voiced serious concerns with the Consensus Plan. For example, the Michigan Department of Information Technology (which is responsible for Michigan's statewide 800 MHz public safety communications network) has "significant concerns about many aspects of the plan."<sup>9</sup> The City of Philadelphia raised questions regarding the plan's funding and the design of the Relocation Coordination Committee.<sup>10</sup> The City of Baltimore is flatly opposed to the Consensus Plan, stating that it "is premature and cannot be adopted in its current form."<sup>11</sup> The Public Safety Improvement Coalition, representing seven cities and counties, characterizes the Consensus Plan as "unacceptable."<sup>12</sup>

**Critical Infrastructure Entities.** Southern is not aware of a single utility that supports the Consensus Plan.<sup>13</sup> The joint comments of the United Telecom Council ("UTC") and the

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<sup>9</sup> Comments of the Communications Division, Michigan Department of Information Technology, to Supplemental Comments of the Consensus Parties at 2 (Feb. 10, 2003).

<sup>10</sup> Comments of the City of Philadelphia on the Supplemental Comments of the "Consensus Parties" (Feb. 10, 2003).

<sup>11</sup> Comments of the City of Baltimore, Maryland at 1 (Feb. 10, 2003).

<sup>12</sup> Comments of the Public Safety Improvement Coalition at 14 (Feb. 10, 2003). The Public Safety Improvement Coalition is comprised of Washington, DC; Denver; the City of San Diego; the County of San Diego; Anne Arundel County, Maryland; Fauquier County, Virginia; and Osceola County, Florida.

<sup>13</sup> *See, e.g.*, Comments of the United Telecom Council and the Edison Electric Institute on the Supplemental Comments (Feb. 10, 2003); Comments of the National Rural Electric Cooperative Association Responding to Public Notice of January 3, 2003 (DA 03-19) (Feb. 10, 2003); Comments of American Electric Power Company (Feb. 10, 2003); Comments of Carolina Power and Light Company and TXU Business Services on Supplemental Comments of the "Consensus Parties" (Feb. 10, 2003); Comments of

Edison Electric Institute ("EEI") are representative of utilities generally: They state that the Consensus Plan is "massively complex, inequitable, and would not meet the goals of this proceeding."<sup>14</sup> AEP asserts that the plan "puts the nation's critical infrastructure in jeopardy."<sup>15</sup> Carolina Power and Light Company, TXU Energy, Progress Energy, Florida Power Corporation, and North Carolina Natural Gas filed joint comments contending that the Consensus Plan is "fatally flawed, in both substance and process."<sup>16</sup>

**Business and Industrial/Land Transportation ("B/ILT") Licensees.** The National Association of Manufacturers ("NAM"), which represents approximately 14,000 members, filed comments discussing numerous problems with the Consensus Plan and describes it as "not suitable for adoption."<sup>17</sup> Boeing is similarly opposed, stating that the plan is "a completely unviable proposition."<sup>18</sup>

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Ameren Corporation (Feb. 10, 2003); Comments of Alliant Energy (Feb. 10, 2003); Supplemental Comments of Entergy Corporation and Entergy Services (Feb. 10, 2003); Supplemental Comments of Cinergy Corporation (Feb. 10, 2003); Supplemental Comments of Consumers Energy Company (Feb. 10, 2003); Supplemental Comments of Consolidated Edison Company of New York (Feb. 10, 2003); Supplemental Comments of Xcel Energy Services (Feb. 10, 2003); Comments of Duquesne Light Company (Feb. 11, 2003); Comments of Baltimore Gas and Electric Company (Feb. 7, 2003); Comments of MidAmerican Energy (Feb. 10, 2003); Comments of Central Maine Power Company Regarding the December 24, 2002 "Supplemental Comments of the Consensus Parties" (Feb. 10, 2003); Further Comments of the East Bay Municipal Utility District (Feb. 10, 2003); Third Round of Reply Comments of Pinnacle West Capital Corporation to the Private Wireless Coalition "Consensus Plan" (Feb. 10, 2003); Comments of Gainesville Regional Utilities to the "Supplemental Comments of the Consensus Parties" (Feb. 11, 2003).

<sup>14</sup> Comments of the United Telecom Council and the Edison Electric Institute on the Supplemental Comments at 1-2 (Feb. 10, 2003).

<sup>15</sup> Comments of American Electric Power Company at 18 (Feb. 10, 2003).

<sup>16</sup> Comments of Carolina Power and Light Company and TXU Business Services on Supplemental Comments of the "Consensus Parties" at 1 (Feb. 10, 2003).

<sup>17</sup> Comments of the National Association of Manufacturers and MRFAC at i (Feb. 10, 2003).

<sup>18</sup> Comments of The Boeing Company at iii (Feb. 10, 2003).

**SMR Carriers.** SMR carriers, many of which are small businesses that could suffer significant business losses upon implementation of the Consensus Plan, have offered impassioned comments in opposition to it.<sup>19</sup> For example, Mobile Relay Associates ("MRA") contends that SMR licensees forced to relocate their entire customer base from a particular channel would lose over 50% of their customers due to the disruption.<sup>20</sup> MRA notes that when it had to relocate from the Upper 200 SMR channels, "Nextel's marketing department used the occasion of MRA's customer relocation to poach MRA's customers, emphasizing to them in sales calls the inconvenience associated with replacement/retuning of the customer's entire fleet all at once, and the relative ease of simply becoming a Nextel customer instead."<sup>21</sup>

**CMRS Carriers.** CMRS carriers have vigorously opposed the Consensus Plan from the start, and nothing in the Supplemental Filing changed that position.<sup>22</sup> The Cellular Telecommunications & Internet Association ("CTIA") characterizes the plan as "dangerously flawed . . . In addition to being incredibly complicated, the proposal also suffers from additional procedural, equitable, and legal deficiencies."<sup>23</sup> Verizon Wireless "urges the Commission to

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<sup>19</sup> See Comments of Mobile Relay Associates on Supplemental Comments of the "Consensus Parties" (Feb. 10, 2003); Comments of Preferred Communication Systems on Supplemental Comments of the Consensus Parties (Feb. 10, 2003); Comments of Palomar Communications to Supplemental Comments of the Consensus Parties (Feb. 10, 2003); Comments of Peak Relay to Supplemental Comments of the Consensus Parties (Feb. 10, 2003).

<sup>20</sup> Comments of Mobile Relay Associates on Supplemental Comments of the "Consensus Parties" at 2 n.2 (Feb. 10, 2003).

<sup>21</sup> Comments of Mobile Relay Associates on Supplemental Comments of the "Consensus Parties" at 12-13 (Feb. 10, 2003).

<sup>22</sup> See Comments of the Cellular Telecommunications & Internet Association (Feb. 10, 2003); Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation (Feb. 10, 2003); Comments of Verizon Wireless to Supplemental Comments of the Consensus Parties (Feb. 10, 2003).

<sup>23</sup> Comments of the Cellular Telecommunications & Internet Association at 4, 6 (Feb. 10, 2003).

reject the Consensus Plan as unjustified, unworkable, and illegal. It does not eliminate the potential for interference to public safety operations, it relies on a precarious and implausible funding mechanism that is legally unenforceable, and it grants a substantial windfall to Nextel.”<sup>24</sup>

**700 MHz Licensees.** Harbor Wireless, a 700 MHz Guard Band licensee, opposes the Consensus Plan in part because it would permit Nextel to simply relinquish its 700 MHz Guard Band spectrum and convert it to public safety spectrum with no consideration for the concerns of other Guard Band licensees.<sup>25</sup> This action would result in Harbor Wireless and other 700 MHz Guard Band licensees becoming co-primary, shared users with public safety licensees.<sup>26</sup> Harbor Wireless contends that such changes in the regulatory and licensing framework of the band would substantially reduce its value, which is obviously contrary to what Guard Band licensees bargained for when they purchased the spectrum at auction.<sup>27</sup> Access Spectrum, a holder of 700 MHz Guard Band licenses across the country, is strongly opposed to the Consensus Plan, contending that it is motivated far more by private agendas than the public interest.<sup>28</sup>

**900 MHz Licensees.** American West Airlines, Shell Oil Products USA, and several other licensees in the 900 MHz band filed comments asserting that allowing Nextel to temporarily shift its operations into the 900 MHz band, as contemplated by the Consensus Plan, could result in the same interference problems in that band that Nextel is currently causing in the

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<sup>24</sup> Comments of Verizon Wireless to Supplemental Comments of the Consensus Parties at 17 (Feb. 10, 2003).

<sup>25</sup> Comments of Harbor Wireless on the Supplemental Comments of the Consensus Parties at ii-iii (Feb. 10, 2003).

<sup>26</sup> Comments of Harbor Wireless on the Supplemental Comments of the Consensus Parties at ii (Feb. 10, 2003).

<sup>27</sup> Comments of Harbor Wireless on the Supplemental Comments of the Consensus Parties at ii, 4 (Feb. 10, 2003).

<sup>28</sup> Comments of Access Spectrum at 1-2 (Feb. 10, 2003).

800 MHz band.<sup>29</sup> Electrocom, another 900 MHz licensee, contends that differences between the 800 MHz and 900 MHz band allocations would place 900 MHz licensees at even greater risk of interference from Nextel than 800 MHz licensees.<sup>30</sup>

**1.9 GHz Services.** The Commission would have to relocate unlicensed PCS ("UPCS") users from 1910-1915 MHz if it decides to provide Nextel with the 1.9 GHz spectrum that Nextel requested (which the Commission should not do). UTAM, the designated frequency coordinator for the UPCS band, strenuously objects to such relocation on the ground that it "would upset the reasonable and legitimate expectations of industry members and end users who have expended considerable efforts and funds to develop the unlicensed PCS market space."<sup>31</sup> The Wireless Communications Association International is also opposed to this aspect of the plan, asserting that "Nextel's proposed surrender of its 700/800/900 MHz spectrum bears no meaningful relationship to the interference Nextel is causing to public safety operations and is not necessary to solve that problem."<sup>32</sup>

**Border Area Licensees.** The Border Area Coalition, a group of licensees with 800 MHz spectrum in the Canadian and Mexican border regions (including the City of San Diego, Consumers Energy Company, Boeing and DaimlerChrysler) have identified an array of serious problems with the Consensus Plan's proposals for addressing border issues, not the least of which

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<sup>29</sup> Comments of the 900 MHz Industrial User Group at 1 (Feb. 10, 1993). The 900 MHz Industrial User Group is comprised of America West Airlines, Shell Oil Products USA, Pro Tec Communications, Star Crystal Communications, Cobb Electric Membership Corp., Jackson Electric Membership Corp., and the National Rural Electrification Cooperative Association.

<sup>30</sup> Comments of Electrocom on Supplemental Comments of the Consensus Parties at 3 (Feb. 10, 2003).

<sup>31</sup> Comments of UTAM on Supplemental Filing by the Consensus Parties at 1-2 (Feb. 10, 2003).

<sup>32</sup> Comments of Wireless Communications Association International at 5 (Feb. 10, 2003).

is the need to negotiate bilateral agreements with Canada and Mexico in order to implement the plan.<sup>33</sup> They thus urge the Commission to reject the plan.<sup>34</sup>

Given the array of opposition described above, titling the PWC Commenters' proposal "the Consensus Plan" is clearly a misnomer. Not only is the plan opposed by multiple 800 MHz licensees, but it also faces enmity from licensees in other bands whose operations will be directly affected by the contemplated rebanding process. Additionally, some of the signatories to the plan have few 800 MHz licenses at stake, which begs the question of what value their names add as representing a "consensus."

### **III. THE CONSENSUS PLAN WOULD NOT SUBSTANTIALLY MITIGATE PUBLIC SAFETY INTERFERENCE**

An underlying issue with regard to the Consensus Plan is whether the complicated, costly, and burdensome rebanding it contemplates would substantially mitigate 800 MHz public safety interference. The answer, as Southern and other commenters indicated when the Consensus Plan was first proposed, is no. For example, Southern observed that Nextel's analysis of the interference mitigation benefits of rebanding failed to take account of fifth order intermodulation interference, which is an important source of public safety interference.<sup>35</sup> Also, there is no evidence that rebanding would reduce *any* type of intermodulation interference to the many public safety licensees (or B/ILT licensees) that would be located above the "new" NPSPAC band (*i.e.*, above 806-809/851-854 MHz).<sup>36</sup> Furthermore, a coalition of CMRS carriers

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<sup>33</sup> Comments of the Border Area Coalition at i-ii (Feb. 10, 2003). The Border Area Coalition is comprised of The Boeing Company, Consumers Energy Company, DaimlerChrysler, Pinnacle West Capital Corp., City of San Diego, San Diego County and Imperial County Regional Communications System, and Wiztronics.

<sup>34</sup> Comments of the Border Area Coalition at i-ii (Feb. 10, 2003).

<sup>35</sup> Further Comments of Southern LINC at 6 (Sept. 23, 2002).

<sup>36</sup> Further Comments of Southern LINC at 7 (Sept. 23, 2002).



asserted that the PWC Commenters' rebanding proposal "has absolutely *no impact* . . . on receiver overload," another form of public safety interference.<sup>37</sup>

In this comment round, several parties again raised the limited utility of the rebanding contemplated in the Consensus Plan. The City of New York stated that it "is very concerned that it would continue to be vulnerable to interference if it were to remain in the guard band as currently proposed."<sup>38</sup> The very fact that licensees in the so-called guard band would be subject to Nextel-generated interference with very little opportunity for recourse indicates that Nextel is unwilling to commit to *managing* intermodulation interference as it indicated in earlier phases of this proceeding.<sup>39</sup> The Michigan Department of Information Technology observes that "[t]he Consensus Parties recognize that interference problems may exist even after the reorganization of the band" and, as such, questions whether the plan should be adopted.<sup>40</sup> Verizon Wireless reiterates that rebanding will do nothing to mitigate receiver overload interference.<sup>41</sup> Several CMRS carriers emphasize that the Consensus Plan calls for the continued use of interference mitigation techniques even after rebanding is completed and, as such, inquire as to "whether Nextel's proposed \$850 million contribution would be better spent by simply undertaking remedial efforts to resolve the interference its own engineering decisions have caused."<sup>42</sup>

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<sup>37</sup> Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Coupe Communications, Nokia, Southern LINC, and United States Cellular Corporation at 6 (Sept. 23, 2002) (emphasis in original).

<sup>38</sup> Comments of the City of New York at 7 (Feb. 10, 2003).

<sup>39</sup> *See, e.g.*, Comments of Nextel Communications at 23-24 (Sept. 23, 2002) (rebanding "would reduce the likelihood of IM interference to a manageable level").

<sup>40</sup> Comments of the Communications Division, Michigan Department of Information Technology, to Supplemental Comments of the Consensus Parties at 6 (Feb. 10, 2003).

<sup>41</sup> Comments of Verizon Wireless to Supplemental Comments of the Consensus Parties at 3-4 (Feb. 10, 2003)

<sup>42</sup> Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation at 14-15 (Feb. 10, 2003).

#### **IV. BOTH PUBLIC SAFETY AND NON-PUBLIC SAFETY COMMENTERS AGREE THAT THE CONSENSUS PLAN'S FUNDING IS FAR TOO UNCERTAIN TO ALLOW FOR APPROVAL OF THE PLAN**

Nearly all commenters raised numerous concerns with the Consensus Plan's funding. Some of the most consistent and prevalent comments in this regard came from the public safety community. On an initial level, several public safety commenters are concerned that funding for their relocations will not be assured. The City of Philadelphia points out that Nextel will not be providing its \$850 million pledge all at once but, rather, will be doling it out in relatively small periodic increments of \$25 million.<sup>43</sup> Philadelphia is concerned that if Nextel stops making payments due to bankruptcy or other unforeseen reasons, the "collateral" offered by Nextel to back up the remainder of the funding will not be sufficient to actually cover the remainder.<sup>44</sup> The Public Safety Improvement Coalition, representing seven cities and counties, shares this concern.<sup>45</sup> The City of Baltimore asserts that because Nextel's pledge is voluntary and unenforceable by the Commission, it is an unacceptable funding mechanism.<sup>46</sup>

Public safety commenters were also greatly concerned that Nextel's pledge of \$700 million for public safety relocations will not be sufficient. To that end, many argued that Nextel's contribution should not be capped.<sup>47</sup> The City of New York incredulously notes that

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<sup>43</sup> Comments of the City of Philadelphia on the Supplemental Comments of the "Consensus Parties" at 4-5 (Feb. 10, 2003).

<sup>44</sup> Comments of the City of Philadelphia on the Supplemental Comments of the "Consensus Parties" at 4-5 (Feb. 10, 2003).

<sup>45</sup> Comments of the Public Safety Improvement Coalition at 5 (Feb. 10, 2003). The Public Safety Improvement Coalition is comprised of Washington, DC; Denver; the City of San Diego; the County of San Diego; Anne Arundel County, Maryland; Fauquier County, Virginia; and Osceola County, Florida.

<sup>46</sup> Comments of the City of Baltimore, Maryland at 3 (Feb. 10, 2003).

<sup>47</sup> See Comments by the State of Florida to the Supplemental Comments at 1 (Feb. 10, 2003); Comments of the City of Philadelphia on the Supplemental Comments of the "Consensus Parties" at 3 (Feb. 10, 2003); Comments of the Public Safety Improvement Coalition at 2 (Feb. 10, 2003).

although the PWC Commenters concede that their cost assessment is "subject to several significant variables," the \$700 million funding commitment provides only a razor-thin margin for error (the PWC Commenters estimate that the cost of relocating public safety licensees will exceed \$698 million).<sup>48</sup> The Michigan Department of Information Technology notes that the PWC Commenters' cost estimate was partially based on visits to public safety systems, but they did not visit any systems with more than thirteen sites.<sup>49</sup> Michigan's statewide system, in contrast, has 181 sites.<sup>50</sup> The City and County of San Diego state frankly that they do not think \$700 million will be enough,<sup>51</sup> and the City of Philadelphia finds it "probable" that capping the amount at \$700 million "will result in substantial under-funding."<sup>52</sup>

The logical follow-on question raised by public safety commenters is: what will happen if the \$700 million runs out before relocations are completed? The City of New York "remains troubled that no provision has been made for additional funding in the event that the \$700 million . . . runs out."<sup>53</sup> The City of Baltimore asks whether the NPSPAC allocations will become bifurcated, with those for whom funding was available being relocated to the "new" NPSPAC band and those for whom funding ran out being relegated to the "old" NPSPAC band -- where Nextel would soon begin operating.<sup>54</sup> The Michigan Department of Information Technology hints that the possibility of stranding a number of public safety agencies in a high

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<sup>48</sup> Comments of the City of New York at 5 (Feb. 10, 2003).

<sup>49</sup> Comments of the Communications Division, Michigan Department of Information Technology, to Supplemental Comments of the Consensus Parties at 3 (Feb. 10, 2003).

<sup>50</sup> Comments of the Communications Division, Michigan Department of Information Technology, to Supplemental Comments of the Consensus Parties at 3 (Feb. 10, 2003).

<sup>51</sup> Comments of the City and County of San Diego at 13 (Feb. 10, 2003).

<sup>52</sup> Comments of the City of Philadelphia on the Supplemental Comments of the "Consensus Parties" at 3 (Feb. 10, 2003).

<sup>53</sup> Comments of the City of New York at 5 (Feb. 10, 2003).

<sup>54</sup> Comments of the City of Baltimore, Maryland at 4 (Feb. 10, 2003).

interference environment (the "old" NPSPAC band after Nextel moves in) may not be entirely unintentional given that "Nextel has been active in proposing to provide communications services to public safety agencies."<sup>55</sup>

Public safety licensees were not the only commenters concerned about the possibility of the proposed funding being inadequate. For example, Ameren Corporation notes that the PWC Commenters' assertion that \$150 million will be enough to relocate non-public safety licensees is largely based on the assumption that only five percent of B/ILT equipment will have to be replaced.<sup>56</sup> Ameren estimates that at least ten percent of its equipment would have to be replaced and that licensees with older systems will have to replace even more.<sup>57</sup> As a result, Ameren believes that the costs of relocating non-public safety licensees "will far surpass the \$150 million projection."<sup>58</sup> Boeing asserts that "relocation costs will *overwhelmingly* exceed the proposed funding pool."<sup>59</sup> NAM and MRFAC also question whether Nextel's funding commitment will be sufficient.<sup>60</sup>

The proposed funding may also be inadequate due to a subset of costs not even contemplated by the PWC Commenters. Motorola points out that Nextel's \$850 million funding commitment does not encompass potentially tremendous costs that would be incurred by manufacturers to develop new handset software and operating systems ("firmware") necessary to

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<sup>55</sup> Comments of the Communications Division, Michigan Department of Information Technology, to Supplemental Comments of the Consensus Parties at 3 (Feb. 10, 2003).

<sup>56</sup> Comments of Ameren Corporation at 5 (Feb. 10, 2003).

<sup>57</sup> Comments of Ameren Corporation at 5 (Feb. 10, 2003).

<sup>58</sup> Comments of Ameren Corporation at 5-6 (Feb. 10, 2003).

<sup>59</sup> Comments of The Boeing Company at 23 (Feb. 10, 2003) (emphasis in original).

<sup>60</sup> Comments of the National Association of Manufacturers and MRFAC at 4 (Feb. 10, 2003).

relocate public safety licensees from the current NPSPAC band to the proposed NPSPAC band.<sup>61</sup>

Motorola "estimates that manufacturers will have to dedicate *hundreds of staff years* in firmware development before radios operating in the NPSPAC channels can be programmed to operate in the new NPSPAC spectrum."<sup>62</sup> Motorola requests that these costs be funded.<sup>63</sup>

There is also the matter of possible declines in Nextel's financial solvency, which could impact its ability to fund the Consensus Plan and lead creditors to attempt to raid any relocation funds or collateralized assets already provided but not yet distributed. Nextel is carrying a tremendous debt load, which stood at approximately \$14 billion as of the third quarter of 2002.<sup>64</sup>

Commenters also drew parallels between the *NextWave* litigation and Nextel's proposal to mete out its \$850 million funding commitment in periodic increments of \$25 million.<sup>65</sup> Although Nextel would initially pay out just \$25 million, it expects to get its requested 10 MHz of 1.9 GHz spectrum immediately.<sup>66</sup> Nextel would thus be making an "installment payment" of just 3% on its \$850 million pledge (and as commenters pointed out, the spectrum is actually worth *far* more than \$850 million).<sup>67</sup> Given the Supreme Court's *NextWave* decision and the years of contentious litigation that preceded it, the Commission should know better than to go

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<sup>61</sup> Comments of Motorola at 21-23 (Feb. 10, 2003).

<sup>62</sup> Comments of Motorola at 22 (Feb. 10, 2003) (emphasis added).

<sup>63</sup> Comments of Motorola at 22-23 (Feb. 10, 2003) (emphasis added).

<sup>64</sup> Linda Loyd, *Slumping Demand, Falling Prices Hit Wireless Sector*, Philadelphia Inquirer, Sept. 24, 2002.

<sup>65</sup> See, e.g., Comments of Cellular Telecommunications & Internet Association at 8-9 (Feb. 10, 2003); Supplemental Comments of Entergy Corporation and Entergy Services, Inc. at 26-27 (Feb. 10, 2003).

<sup>66</sup> Supplemental Comments of the Consensus Parties at 7, 34 (Dec. 24, 2002).

<sup>67</sup> Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation at 10 n.38 (Feb. 10, 2003); Comments of Access Spectrum at 13-14 (Feb. 10, 2003).

down this path.<sup>68</sup> Any attempts to repossess or otherwise treat as collateral spectrum given to Nextel would almost certainly be fraught with intense legal obstacles and difficulty.

Additionally, as Southern noted in its Supplemental Comments, the overarching question is whether the Commission has authority to order Nextel to fund the Consensus Plan and whether it has authority to enforce the funding commitment if relocations are begun.<sup>69</sup> Southern contends that the Commission lacks such authority, and it is joined by numerous other commenters in that belief. For example, CTIA cautions that the Consensus Plan "requires the Commission to *accept the word of Nextel* that it will continue to fund the relocation of incumbent 800 MHz licensees."<sup>70</sup> Similarly, Verizon Wireless notes that the Consensus Plan "omit[s] any explanation as to how the relocation fund would be legally enforceable."<sup>71</sup>

In short, if the Consensus Plan is adopted with its proposed funding mechanism, that mechanism will most likely prove insufficient, resulting in partial rebanding across the United States. Aside from the sufficiency of the amount offered by Nextel, the Commission cannot compel the provision of the promised \$850 million. Finally, it cannot protect the funding mechanism from future changes in spectrum values or declines in Nextel's financial solvency, leaving public safety licensees vulnerable to an increased potential for interference.

## **V. COMMENTERS AGREE THAT THE PROPOSED RCC IS OF QUESTIONABLE LEGALITY AND POORLY CONCEIVED**

The Relocation Coordination Committee ("RCC") proposed in the Supplemental Filing would have unprecedented authority to design and implement a revised 800 MHz band plan.

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<sup>68</sup> *FCC v. NextWave Personal Communications, Inc.*, 123 S. Ct. 832 (2003).

<sup>69</sup> Supplemental Comments of Southern LINC at 5-7 (Feb. 10, 2003).

<sup>70</sup> Comments of the Cellular Telecommunications & Internet Association at 7 (Feb. 10, 2003).

<sup>71</sup> Comments of Verizon Wireless to Supplemental Comments of the Consensus Parties at 9 (Feb. 10, 2003).

Southern opposed this body on numerous grounds, including: (1) the lack of any Commission authority to create it; (2) the nearly complete absence of essential Commission oversight; (3) the requirement that incumbent licensees needlessly provide the Commission with massive amounts of sensitive system information; and (4) the inability of affected licensees to appeal its decisions.<sup>72</sup> Many other commenters share these concerns.

#### **A. The Commission Lacks Authority To Create The RCC**

Like Southern, numerous commenters questioned the legality of the Commission delegating an extraordinary amount of authority to the RCC, as called for in the Consensus Plan. UTC and EEI note that although the RCC "more or less would take over the FCC's responsibilities in the 800 MHz band," it would not be subject to the usual federal agency safeguards.<sup>73</sup> Carolina Power and Light Company, TXU Energy, Progress Energy, Florida Power Corporation, and North Carolina Natural Gas filed joint comments noting that the PWC Commenters have not provided "the slightest explanation, much less convincing demonstration, of what legal authority would entitle the Commission to delegate to such a private consortium the enormous power they now seek."<sup>74</sup> Consumers Energy Company and Consolidated Edison Company of New York assert that nothing in the Communications Act of 1934 authorizes the Commission to delegate its authority to a group such as the RCC.<sup>75</sup> NAM, MRFAC, and Small

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<sup>72</sup> Supplemental Comments of Southern LINC at 12-33 (Feb. 10, 2003).

<sup>73</sup> Comments of the United Telecom Council and the Edison Electric Institute on Supplemental Comments at 8 (Feb. 10, 2003).

<sup>74</sup> Comments of Carolina Power and Light Company and TXU Business Services on Supplemental Comments of the "Consensus Parties" at 8 (Feb. 10, 2003).

<sup>75</sup> Supplemental Comments of Consumers Energy Company at 23-24 (Feb. 10, 2003); Comments of Consolidated Edison Company of New York at 12 (Feb. 10, 2003).

Business in Telecommunications seriously question the Commissions' authority to create the RCC.<sup>76</sup>

## **B. The RCC Would Lack Sufficient Commission Oversight**

Southern also argued that the RCC would unlawfully lack oversight, transparency, and accountability.<sup>77</sup> Other parties also expressed this view from various angles. The Public Safety Improvement Coalition argues for greater public oversight of the RCC, noting that with regard to designing and implementing a new band plan, "only the FCC can make the decisions . . . the agency must have the final word."<sup>78</sup> AEP is concerned that the RCC would be so heavily influenced by Nextel and public safety such that "the deck will be stacked against B/ILT interests from the outset," a worry that could be alleviated with greater oversight.<sup>79</sup> Along those lines, NAM and MRFAC observe that the Consensus Plan contains no anti-discrimination rules that would be applied to the RCC.<sup>80</sup> Small Business in Telecommunications surely voices the fears of many licensees when it asks, "[W]hat voice on the RCC will speak for those who are not committed to Nextel's agenda via participation in the PWC plan?"<sup>81</sup>

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<sup>76</sup> Comments of the National Association of Manufacturers and MRFAC at 12 n.19 (Feb. 10, 2003). Comments of Small Business in Telecommunications to Supplemental Comments of the Consensus Parties at 23 (Feb. 10, 2003).

<sup>77</sup> Supplemental Comments of Southern LINC at 23-25 (Feb. 10, 2003).

<sup>78</sup> Comments of the Public Safety Improvement Coalition at 7 (Feb. 10, 2003).

<sup>79</sup> Comments of American Electric Power Company at 12-13 (Feb. 10, 2003).

<sup>80</sup> Comments of the National Association of Manufacturers and MRFAC at 12 (Feb. 10, 2003).

<sup>81</sup> Comments of Small Business in Telecommunications to Supplemental Comments of the Consensus Parties at 23-24 (Feb. 10, 2003).



**C. Incumbent Licensees Would Be Required To Provide Massive Amounts Of Sensitive System Information To The RCC**

Like Southern, other licensees also discussed the amount of system information that incumbent licensees would be expected to provide to Nextel and the RCC. Southern contended that providing this information would be unnecessary, anticompetitive, and unwise.<sup>82</sup> Other parties voiced similar concerns. The Michigan Department of Information Technology, UTC, EEI, and AEP observe that this requirement could pose a threat to national security, as terrorist groups would find such information highly valuable.<sup>83</sup> That concern, unfortunately, is firmly grounded in reality: the United States discovered fairly recently that terrorists in Afghanistan had diagrams of American nuclear power plants and public water facilities.<sup>84</sup> The seriousness of such a discovery has been highlighted by, among others, Robert Charles, counsel and staff director to the U.S. House National Security Subcommittee from 1995-1999. Mr. Charles has discussed the likelihood of utilities being "the next primary target."<sup>85</sup> A compilation of key network and system information for a whole host of public safety and critical infrastructure licensees (as well as licensees that serve such entities, such as Southern), could be highly prized by terrorists.

In addition to national security concerns, the Michigan Department of Information Technology, UTC, EEI, and AEP also highlight the potential for entities connected with the RCC

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<sup>82</sup> Supplemental Comments of Southern LINC at 31-33 (Feb. 10, 2003).

<sup>83</sup> Comments of the Communications Division, Michigan Department of Information Technology, to Supplemental Comments of the Consensus Parties at 5 (Feb. 10, 2003); Comments of the United Telecom Council and the Edison Electric Institute on Supplemental Comments at 10 (Feb. 10, 2003); Comments of American Electric Power Company at 14 (Feb. 10, 2003).

<sup>84</sup> David Johnston and James Risen, *Seized Afghan Files Show Intent, Not Plans*, N.Y. Times, Feb. 1, 2002, at A13.

<sup>85</sup> Robert Charles, *Priority Requested for Protecting Utilities*, Washington Times, Mar. 4, 2002, at A17.

to use the system information to advance commercial interests.<sup>86</sup> To that end, Small Business in Telecommunications voiced its opinion that Nextel's past behavior indicates that it might use the information "to raid customer lists."<sup>87</sup> Small Business in Telecommunications warns that "once proprietary system and customer information is allowed to be gathered, there exists no effective means for limiting its dissemination and misuse."<sup>88</sup> Indeed, as Southern noted, system information provided to Nextel, the RCC, and the FCC would be subject to disclosure pursuant to FOIA; only Congressional legislation could exempt it from FOIA.<sup>89</sup>

#### **D. The RCC's Decisions Would Be Unappealable**

In its Supplemental Comments, Southern observed that the Consensus Plan contains no provision for appealing decisions of the RCC and only very limited leeway for appealing decisions of the associated arbitration panel.<sup>90</sup> This unlawful lack of appellate recourse alarmed numerous parties. Carolina Power and Light Company, TXU Energy, Progress Energy, Florida Power Corporation, and North Carolina Natural Gas raise the issue, noting the RCC's "virtually unlimited and unreviewable discretion."<sup>91</sup> NAM and MRFAC assert that this lack of appellate recourse is "a major and unwarranted infringement on licensee rights" and is in contravention of

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<sup>86</sup> Comments of the Communications Division, Michigan Department of Information Technology, to Supplemental Comments of the Consensus Parties at 5 (Feb. 10, 2003); Comments of the United Telecom Council and the Edison Electric Institute on Supplemental Comments at 10 n.20 (Feb. 10, 2003); Comments of American Electric Power Company at 14 (Feb. 10, 2003).

<sup>87</sup> Supplemental Comments of Small Business in Telecommunications to Supplemental Comments of the Consensus Parties at 7 (Feb. 10, 2003).

<sup>88</sup> Supplemental Comments of Small Business in Telecommunications to Supplemental Comments of the Consensus Parties at 7 (Feb. 10, 2003).

<sup>89</sup> Supplemental Comments of Southern LINC at 32-33 (Feb. 10, 2003).

<sup>90</sup> Supplemental Comments of Southern LINC at 33-34 (Feb. 10, 2003).

<sup>91</sup> Comments of Carolina Power and Light Company and TXU Business Services on Supplemental Comments of the "Consensus Parties" at 8 (Feb. 10, 2003).

the Commission's Rules.<sup>92</sup> Small Business in Telecommunications indicates that the inability to appeal the RCC's decisions heightens the other problems with the RCC.<sup>93</sup>

## **VI. THERE IS VIRTUALLY NO SUPPORT FOR GRANTING NEXTEL 10 MHz OF 1.9 GHz SPECTRUM**

Aside from the PWC Commenters, virtually no parties support granting Nextel 10 MHz of contiguous, nationwide 1.9 GHz spectrum as part of a realignment plan. Southern has contended throughout this proceeding that such a grant is not necessary to mitigate public safety interference or even to implement a realignment plan.<sup>94</sup> Rather, it is an attempt by Nextel to obtain highly valuable and desirable spectrum at a very low cost and to prevent its competitors from applying for the spectrum themselves. Even a public safety commenter expressed significant reservations about this aspect of the Consensus Plan. Specifically, the City of Baltimore observes that the Consensus Plan "fails to address how the Commission is authorized to grant Nextel this license without an Act of Congress."<sup>95</sup>

The strongest opposition to granting Nextel 10 MHz of 1.9 GHz spectrum has come from CMRS licensees.<sup>96</sup> Nextel asserts that their opposition "can only be seen as anti-competitive."<sup>97</sup> That *ad hominem* attack, however, fails to address any of the many, many pages of rational and

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<sup>92</sup> Comments of the National Association of Manufacturers and MRFAC at 16 (Feb. 10, 2003).

<sup>93</sup> Comments of Small Business in Telecommunications to Supplemental Comments of the Consensus Parties at 24 (Feb. 10, 2003).

<sup>94</sup> Comments of Southern LINC at 50 (May 6, 2002); Reply Comments of Southern LINC at 39-40 (Aug. 7, 2002); Further Comments of Southern LINC at 30 (Sept. 23, 2002).

<sup>95</sup> Comments of the City of Baltimore, Maryland at 3 n.3 (Feb. 10, 2003).

<sup>96</sup> *See, e.g.*, Comments of the Cellular Telecommunications & Internet Association at 15-18 (Feb. 10, 2003); Comments of Verizon Wireless to Supplemental Comments of the Consensus Parties at 11-14 (Feb. 10, 2003); Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation at 5-10 (Feb. 10, 2003).

<sup>97</sup> Comments of Nextel Communications and Nextel Partners at ii (Feb. 10, 2003).

reasoned legal and policy arguments against Nextel's spectrum request that have been submitted in this proceeding.<sup>98</sup> Among the reasons cited by CMRS carriers for denying the request are: (1) the request is not necessary to resolve public safety interference or even to effect a realignment plan;<sup>99</sup> (2) the scattered 700, 800, and 900 spectrum that Nextel would be "exchanging" is not remotely equal in value to the contiguous block of 1.9 GHz spectrum it seeks;<sup>100</sup> (3) the request is contrary to the general licensing principles underlying the Ashbacker Doctrine;<sup>101</sup> (4) the request is contrary to the competitive auction principles underlying Section 309(j) of the Communications Act of 1934;<sup>102</sup> and (5) the Commission should not reward Nextel for being the primary causer of public safety interference with 10 MHz of highly valuable spectrum.<sup>103</sup>

It is astounding that Nextel would accuse other carriers of anticompetitive behavior. In this proceeding, it is Nextel that is seeking a grant of 10 MHz of contiguous, nationwide 1.9 GHz

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<sup>98</sup> See, e.g., Comments of the Cellular Telecommunications & Internet Association at 5 (May 6, 2002); Joint Comments of Cingular Wireless and ALLTel Communications at 11-13 (May 6, 2002); Comments of Southern LINC at 50-56 (May 6, 2002); Comments of Verizon Wireless at 9-12 (Sept. 23, 2002); Further Comments of the Cellular Telecommunications & Internet Association at 6-7 (Sept. 23, 2002); Further Comments of Southern LINC at 30-32 (Sept. 23, 2002).

<sup>99</sup> See, e.g., Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation at 8-9 (Feb. 10, 2003); Comments of Verizon Wireless to Supplemental Comments of the Consensus Parties at 12 (Feb. 10, 2003).

<sup>100</sup> See, e.g., Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation at 7 (Feb. 10, 2003); Comments of Verizon Wireless to Supplemental Comments of the Consensus Parties at 12-14 (Feb. 10, 2003).

<sup>101</sup> Comments of Southern LINC at 52-54 (May 6, 2002).

<sup>102</sup> See, e.g., Comments of the Cellular Telecommunications & Internet Association at 16-17 (Feb. 10, 2003); Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation at 10 (Feb. 10, 2003); Comments of Southern LINC at 54-56 (May 6, 2002).

<sup>103</sup> See, e.g., Joint Comments of ALLTel Communications, AT&T Wireless Services, Cingular Wireless, Sprint Corporation, Southern LINC, and United States Cellular Corporation at 6 (Feb. 10, 2003); Comments of Verizon Wireless at 10-11 (Sept. 23, 2002).

spectrum at very low cost and to the complete exclusion of other carriers.<sup>104</sup> No other carriers have made such a request, although they would certainly benefit from having the spectrum. To the contrary, other carriers have argued that any additional commercial spectrum should be allocated through an open, competitive auction.<sup>105</sup> In addition, granting this spectrum to Nextel would entail it giving up its 700 MHz spectrum for public safety use, which as noted above could ultimately result in changes to the regulatory framework of that band, thus harming the remaining 700 MHz Guard Band licensees.<sup>106</sup> Also, the spectrum is currently allocated to UPCS users, who would have to be relocated, despite the fact that they have gone to considerable effort and expense to create a market for devices using 1.9 GHz spectrum.<sup>107</sup> Finally, if the spectrum is simply given to Nextel, it will be completely unavailable to its competitors; they will not even have the opportunity to compete for it at auction.

Non-CMRS parties have also filed comments vigorously opposing Nextel's spectrum request. In this most recent comment round, Boeing describes the request as an unprecedented, anticompetitive, and likely unlawful spectrum grab.<sup>108</sup> It argues that "[g]ranting Nextel 1.9 GHz spectrum, which has nothing to do with the 800 MHz interference problem . . . would clearly

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<sup>104</sup> The Commission must not overlook the fact that granting Nextel 10 MHz of 1.9 GHz spectrum is expected to massively increase the value of its spectrum holdings. Legg Mason Wood Walker, for one, estimates that if Nextel is awarded all the spectrum it requests in the Consensus Plan, it will realize a net increase in spectrum value of \$4.9 billion. Craig Mallitz, Blair Levin, Rebecca Arbogast, *Nextel Takes Another Step in Spectrum Swap Plan*, Legg Mason Wood Walker report (Dec. 31, 2002).

<sup>105</sup> See, e.g., Comments of the Cellular Telecommunications & Internet Association at 15 (Feb. 10, 2003).

<sup>106</sup> Comments of Harbor Wireless on the Supplemental Comments of the Consensus Parties at ii, 4 (Feb. 10, 2003).

<sup>107</sup> Comments of UTAM on Supplemental Filing by the Consensus Parties at 1-2 (Feb. 10, 2003).

<sup>108</sup> Comments of The Boeing Company at 17, 19 (Feb. 10, 2003).

constitute arbitrary and capricious agency action."<sup>109</sup> Access Spectrum sets forth seven pages of reasons for rejecting Nextel's request, including: (1) the request is anticompetitive; (2) granting the request would substantially increase Nextel's coverage and the value of its spectrum holdings; (3) granting the request would violate Section 309(j).<sup>110</sup> Also, as noted above, the City of Baltimore questions "how the Commission is authorized to grant Nextel this license without an Act of Congress."<sup>111</sup> In short, opposition to rewarding Nextel for causing interference to public safety systems is widespread and well-grounded in law and policy.

## **VII. ADOPTION OF THE CONSENSUS PLAN WOULD DIMINISH THE VALUE OF SPECTRUM HELD BY NON-NEXTEL LICENSEES IN THE 700 AND 800 MHz BANDS AND REDUCE COMPETITION**

As noted above, Harbor Wireless, a 700 MHz Guard Band licensee, opposes the Consensus Plan in part because it would permit Nextel to simply relinquish its 700 MHz Guard Band spectrum and convert it to public safety spectrum with no consideration for the concerns of other Guard Band licensees.<sup>112</sup> This action would result in Harbor Wireless and other 700 MHz Guard Band licensees becoming co-primary, shared users with public safety licensees.<sup>113</sup> Harbor Wireless contends that such changes in the regulatory and licensing framework of the band would substantially reduce its value, which is obviously contrary to what Guard Band licensees bargained for when they purchased the spectrum at auction.<sup>114</sup>

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<sup>109</sup> Comments of The Boeing Company at 17 (Feb. 10, 2003).

<sup>110</sup> Comments of Access Spectrum at 11-18 (Feb. 10, 2003).

<sup>111</sup> Comments of the City of Baltimore, Maryland at 3 n.3 (Feb. 10, 2003).

<sup>112</sup> Comments of Harbor Wireless on the Supplemental Comments of the Consensus Parties at ii-iii (Feb. 10, 2003).

<sup>113</sup> Comments of Harbor Wireless on the Supplemental Comments of the Consensus Parties at ii (Feb. 10, 2003).

<sup>114</sup> Comments of Harbor Wireless on the Supplemental Comments of the Consensus Parties at ii, 4 (Feb. 10, 2003).

Adoption of the Consensus Plan would have a similar effect on 800 MHz licenses located below 816/861 MHz. Southern and other carriers bid for and purchased licenses for spectrum below 816/861 MHz for millions of dollars with the reasonable expectation that this spectrum would remain amenable to commercial use. However, the Consensus Plan contemplates a new regulatory structure for this portion for the band that would seriously undermine its value for commercial use (*e.g.*, low site, "cellularized systems" would be prohibited). Additionally, Nextel would be permitted to completely vacate the General Category and interleaved portions of the 800 MHz band and move its low-site cellularized operations entirely above 816/861 MHz. Essentially, the Commission would be making the portion of the band above 816/861 MHz the CMRS band and the portion below 816/861 MHz the non-CMRS band. Even if, as proposed in the Consensus Plan, Southern were grandfathered and allowed to operate as a "cellularized" system below 816/861 MHz, it would operate pursuant to a special exception to the general rules.

Southern and numerous other carriers purchased licenses for spectrum below 816/861 MHz with the expectation of being able to operate in an environment amenable to commercial operations using equipment that was already well-developed and deployed in the band. However, adoption of the Consensus Plan would substantially reduce the value of these investments by constraining the use of such systems and architectures. Like the 700 MHz Guard Band licensees, carriers that purchased spectrum below 816/861 MHz bargained for the spectrum with the reasonable expectation that the regulatory structure in place at the time of auction (and still in place today) would be maintained. Moreover, vendors may be reluctant to continue to develop commercial equipment for spectrum below 816/861 MHz if the spectrum is classified as generally unavailable for commercial services using cellularized architectures comparable to Nextel, the largest such licensee in the 806-821/851-866 MHz band. Regulatory red-lining of the

band between "cellularized" and "non-cellularized" carriers could also limit opportunities for roaming among subscribers to different carriers and eliminate the potential for customers of one carrier to place E911 calls on another carrier's network. Thus, non-Nextel commercial licensees remaining in the band below 816/861 MHz would suffer a significant reduction in the value of their investment and potentially lose access to new products and technology.<sup>115</sup> Implementation of the Consensus Plan would, therefore, deal a serious blow to competition for commercial services, and seriously devalue the licenses acquired at auction by all licensees other than Nextel.

**VIII. ALTHOUGH THE COMMISSION SHOULD IMMEDIATELY ADOPT NEW INTERFERENCE MITIGATION PROCEDURES, IT IS PREMATURE TO ADOPT NEW TECHNICAL STANDARDS**

Appendix F to the Supplemental Filing contains suggested technology standards and restrictions for 800 MHz licensees, which the PWC Commenters claim will help mitigate public safety interference.<sup>116</sup> For instance, Section 4.1.2 of Appendix F prescribes out-of-band emissions limits for licensees in the 861-895 MHz band.<sup>117</sup> Several commenters took note of these standards and restrictions. For example, Boeing contends that the PWC Commenter's suggestion of requiring licensees in certain bands to increase power levels after rebanding "would prove technically prohibitive and would likely violate existing bilateral agreements."<sup>118</sup>

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<sup>115</sup> In designing auction rules, the Commission is required, among other things, to promote economic opportunity and competition, avoid excessive concentration of licenses, and ensure that applicants have an opportunity to evaluate availability of equipment before submitting bids. 47 U.S.C. § 309(j)(3) (2000). It would defeat the purpose of Section 309 if the FCC could auction spectrum licenses under one set of rules and then significantly revise those rules for the benefit of one licensee and to the detriment of all other competitive bidders.

<sup>116</sup> Supplemental Comments of the Consensus Parties, Appendix F (Dec. 24, 2002).

<sup>117</sup> Supplemental Comments of the Consensus Parties at Appendix F-8 (Dec. 24, 2002).

<sup>118</sup> Comments of The Boeing Company at 12-13 (Feb. 10, 2003).



Southern believes that it is premature for the Commission to give consideration to new technology restrictions and similar technical rules. At this stage of the proceeding, the Commission does not know whether it will implement a realignment of the 800 MHz band, and if it does implement realignment, it does not know the exact form that such realignment would take. Any rebanding would have a highly significant impact on the efficacy of any potential technical rules. In other words, technical rules that arguably help alleviate interference under one 800 MHz band structure might not help at all under another structure. Even worse, premature and misguided restrictions could significantly hinder licensees' operations or be impossible to implement.

Rather than considering new technology restrictions and similar technical rules at this stage of the proceeding, the Commission should first issue a report and order adopting immediate interference mitigation measures such as those recommended by Southern in its initial Comments.<sup>119</sup> Those include: (1) establishing a national database of commercial transmitters of 200 feet AGL or less; (2) affirming the responsibility of licensees causing interference to correct it; (3) establishing times frames to ensure prompt resolution of interference; (4) allowing parties to use a range of interference resolution options; and (5) adopting arbitration procedures. Once the Commission's decision regarding the structure of the 800 MHz band is known, the Commission should appoint a technical advisory committee (which would be independent of the parties to this proceeding) to review whether any new technical rules are advisable for the band to further mitigate interference.<sup>120</sup> Because sound engineering solutions must, at a minimum, take into account the structure of the band (*e.g.*, whether channels are interleaved), this is the only logical way to proceed forward with new technical rules.

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<sup>119</sup> Comments of Southern LINC at 22-27 (May 6, 2002).

<sup>120</sup> The committee or other body should be truly independent; it should not have as members licensees or licensee associations/organizations.

## **IX. CONCLUSION**

The many comments filed in response to the PWC Commenters' Supplemental Filing demonstrate that the Supplemental Filing failed to answer many of the basic questions and concerns that 800 MHz licensees have about the Consensus Plan. Both public safety and non-public safety licensees continue to express serious reservations about numerous aspects of the plan, including such fundamental components as its funding mechanism and the manner in which it would be implemented. The comments, in fact, indicate that rather than assuaging licensees' concerns, the Supplemental Filing caused even greater concern. In sum, the Consensus Plan remains incapable of solving public safety interference, is overly complex, and is fraught with legal infirmities. The Commission must not adopt it.

**WHEREFORE, THE PREMISES CONSIDERED,** Southern LINC respectfully requests that the Commission act in the public interest as set forth herein.

Respectfully submitted,

/s/ Christine M. Gill

Christine M. Gill  
John R. Delmore  
McDermott, Will & Emery  
600 13<sup>th</sup> Street, N.W.  
Washington, D.C. 20005  
202-756-8000

Michael D. Rosenthal  
Director of Regulatory Affairs  
Southern LINC  
5555 Glenridge Connector, Suite 500  
Atlanta, Georgia 30342  
678-443-1500

Attorneys for Southern LINC

Dated: February 25, 2003

## **CERTIFICATE OF SERVICE**

I, Gloria Smith, do hereby certify that on this 25th day of February 2003, I caused a copy of the foregoing "Supplemental Reply Comments Of Southern LINC" to be mailed via first-class mail to each of the following:

Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Kathleen Q. Abernathy  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Michael J. Copps  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Kevin J. Martin  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Jonathan S. Adelstein  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Samuel Feder  
Commissioner Kevin J. Martin's Office  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Emily Willeford  
Commissioner Kevin J. Martin's Office  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Bryan Tramont  
Chairman Michael K. Powell's Office  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Paul Margie  
Commissioner Michael J. Copps' Office  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Barry Ohlson  
Commissioner Jonathan S. Adelstein's  
Office  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Marsha J. MacBride  
Chairman Michael K. Powell's Office  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Jennifer Manner  
Commissioner Kathleen Q. Abernathy's  
Office  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

John B. Muleta, Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Kathleen O'Brien-Ham  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Catherine W. Seidel  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

David Furth  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Shellie Blakeney  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

D'wana R. Terry  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Thomas P. Stanley  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Michael Wilhelm Wireless  
Telecommunications Bureau Federal  
Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Karen Franklin  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Julius P. Knapp  
Office of Engineering and Technology  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Ed Thomas, Chief  
Office of Engineering and Technology  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Bruce A. Franca  
Office of Engineering and Technology  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Alan Scrim  
Office of Engineering and Technology  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Robert Pepper, Chief  
Office of Plans and Policy  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

/s/ Gloria Smith  
\_\_\_\_\_  
Gloria Smith